

A.No.6622 of 2018

N.SATHISH KUMAR, J.

This application has been filed to pass an order directing the respondents to furnish security to the tune of Rs.17,83,712/-.

2. On 20.02.2019, this Court has passed an order directing the sale of the suit property, by appointing an Advocate Commissioner. The Advocate Commissioner has filed a report and initial upset price was fixed at Rs.90,57,000/-.

3. The learned Senior Counsel appearing for the applicant submitted that since the sale is already ordered by this Court, upset price has to be reduced. When the Court posed a question that since the Award has already been passed, how the process of sale of immovable property would be exercised under Section 9 of the Arbitration and Conciliation Act? the learned Senior Counsel submitted that interim measures under Section 9 of the Act are available, even after the Award is passed. Therefore, his contention is that though the Award is passed, Order 38 Rule 1 of the Original Side Rules gives power to the Court to sell the property, which was attached when directed in a suit or matter. Further, it is his contention that under Section 9 of the Act, this

Court can pass such an order. It is his further contention that Section 9 of the Act also gives power to the Court to sell the immovable property.

4. It is relevant to refer Section 9 of the said Act, which reads as follows:-

“9. Interim measures, etc. by court. -A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court: -

(i) For the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) For an interim measure of protection in respect of any of the following matters, namely: -

(a) The preservation, interim custody or sale of any goods, which are the subject matter of the arbitration agreement;

(b) Securing the amount in dispute in the arbitration;

(c) The detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) Interim injunction or the appointment of a receiver;

(e) Such other interim measure of protection as may appear to the court to be just and convenient,

And the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.”

5. A perusal of the above Section makes it clear that whenever the interim order is passed before arbitral proceedings, arbitral proceedings shall be commenced within a period of 90 days from the date of such order or even in the suit, the Court may determine. Sub-section (3) of Section 9 makes it clear that once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances existed may not render the remedy provided under Section 17 efficacious. Though Section 9 also deals with the interim order, it can be passed even after the arbitral award is passed, but, it makes it clear that such interim order can be passed before the enforcement of the award in accordance with law.

6. When the interim order is passed after the arbitral award, such interim order normally can be passed before the enforcement of award under Section 36 of the said Act. Section 36 of the said Act deals with enforcement of the award and the same makes it clear that where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the court.

7. Sub-section 2 of Section 36 also makes it clear that mere filing of an application under Section 34 itself would not amount stay of award unless stay of operation of the award is granted by the Court. Therefore, interim measure can be granted under Section 9 enabling the party, either to go for arbitration when the order is obtained prior to the arbitration proceedings or after the arbitral award is passed, but before it is enforced in accordance with law under Section 36.

8. When the proceedings culminated into an award, it has to be enforced as provided under Section 36. One cannot take interim orders under Section 9 to enforce the entire award. Statutory provision makes it clear where the time for making an application to set aside the arbitral award under section 34 has expired, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the court.

9. Therefore, when the award is already passed and any action has to be taken for sale of the immovable property, Order 21 of CPC is to be strictly followed. One cannot bypass the said provision for execution of award by way of interim orders granted under Section 9. Though Order 38 Rule 1 of the Original Side Rules deals with the sale of attached property by public auction of

any property when directed in a suit or matter, it makes it clear that the sale shall be conducted in the manner prescribed by Order read 38 Rule I with Order 21 of the Civil Procedure Code.

10. Therefore, conducting sale of immovable property, procedure contemplated under Order 21 of C.P.C is mandatory. Without following such procedure with the aid of interim orders, the immovable property cannot be sold under Section 9 of Arbitration and Conciliation Act. Order 21 Rule 64 of the Code deals with the sale of the property attached in execution. Order 21 Rule 65 provides the manner in which, sale has to be conducted. Order 21 Rule 66 deals with proclamation of sales by public auction. Whenever the immovable property sold in public auction in execution of the decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court. Such proclamation shall be drawn up after notice to the decree-holder and the judgment debtor, such notice also state the time and place of sale, and specify as fairly and accurately as possible.

11. Above Rule makes it very clear that every minute detail of the property to be disclosed in proclamation including the encumbrance attached to such property. Similarly, such proclamation should be published in manner

provided as per Rule 54 sub clause 2 of Order 21. Order 21 Rule 68 deals with time of sale. The same makes it clear that, no sale, shall without the consent in writing of the judgment-debtor, take place until after the expiration of at least 7 days in the case of immovable property calculated from the date on which the copy of the proclamation has been affixed on the Court-house of the Judge ordering the sale.

12. From the above provisions coupled with Order 38 Rule 1 of the Original Side Rules makes it clear that sale of any immovable property should be conducted in a manner prescribed under Order 21 of the Civil Procedure Code. Therefore, mandatory provisions contemplated under Order 21 has to be followed strictly. Similarly, Order 21 Rule 90 provides for application to set aside sale on the ground of irregularity or fraud. Order 21 Rule 92 also makes it clear that third party interest will also be taken note of in following procedure contemplated under Order 21 as indicated above.

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13. Therefore, without following the procedure contemplated under Order 21 in respect of the sale of immovable property attached, immovable property cannot be sold merely on the basis of interim attachment made under Section 9 of the Arbitration and Conciliation Act, the Court cannot pass such a

blanket order for selling the immovable property in public auction. The object of Section 9 is mainly for protection and preservation of any property. Sub-clause (a) of Section 9 deals with sale of any goods, which are the subject matter of the arbitration agreement, sub-clause (c) of Section 9 deals with preservation or inspection of any property, sub-clause (e) deals with such other interim measure of protection as may appear to the court to be just and convenient. Section 9, nowhere contemplates the sale of immovable property. If the intention of the legislature was that during interim measure, immovable property would be sold as provided under sub-clause (a) of Section 9, Legislature would have incorporated the sale of immovable property under Section 9, wherein the conscious omission of “immovable property” for sale, in Section 9 of Arbitration and Conciliation Act makes it clear that immovable property cannot be brought for sale on the basis of the interim order obtained under Section 9 of Arbitration and Conciliation Act. As far as the immovable property is concerned, purpose of proclamation i.e vide publication is to ascertain the nature of third party interest in the property also.

14. Therefore, this Court is of the view that the contention of the learned Senior Counsel that straight away the immovable property would be sold as per the interim order passed under Section 9, cannot be countenanced.

Though this Court has passed such an order to sale of immovable property and appointed an Advocate Commissioner in earlier occasion, this Court is of the view that act of the Court should not prejudice any one.

15. Therefore, without following proper procedure for sale of immovable property, merely on the basis of interim order immovable property cannot be brought for sale. In such view of the matter, the order of this Court ignoring mandatory statutory provision under Order 21 of Civil Procedure Code, is not correct and only per incuriam.

16. In view of the above, the contention of the applicant to reduce the upset price cannot be countenanced. Hence, this application is dismissed. It is for the applicant to workout his remedy by enforcing the award, which is already in his favour as a civil court decree before the proper forum.

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